IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2007 Session

MORRIS PROPERTIES, INC., REALTORS v. NORRIS JOHNSON, ET AL.

Appeal from the Circuit Court for Davidson County
No. 06C2847 Barbara N. Haynes, Judge

No. M2007-00797-COA-R3-CV - Filed April 29, 2008

Morris Properties, Inc. ("Plaintiff"), a Tennessee real estate company, filed suit against four individuals and two corporations ("Defendants"), attempting to allege tortious interference by all defendants, and breach of contract, breach of fiduciary duty and negligence by some defendants. The trial court dismissed the complaint, in accordance with Tenn. R. Civ. P. 12.02(6), for failure to state a claim. Plaintiff subsequently filed simultaneous motions to 1) alter or amend the judgment and 2) amend the complaint. Both motions were denied. Plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal of as Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Timothy A. Davis, Lebanon, Tennessee, for the appellant, Morris Properties, Inc., Realtors.

Eugene N. Bulso, Jr. and Laura F. Dudney, Nashville, Tennessee, for the appellees, Norris Johnson, Norman Nelson, Ann Williams, Brent Kozimor, Norris Johnson Co., LLC and Tennessee Investment Realty Co.

OPINION

It is well settled that "[d]ismissal under Tenn. R. Civ. P. 12.02(6) is warranted . . . when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity." ***City of Brentwood v. Metropolitan Bd. of Zoning Appeals***, 149 S.W.3d 49, 54 (Tenn. Ct. App. 2004). A court evaluating a Rule 12 motion to dismiss must "take as true the allegations of the nonmoving party and resolve all factual disputes in its favor, but it should not credit conclusory allegations or draw farfetched inferences." ***Chenault v. Walker***, 36 S.W.3d 45, 56 (Tenn. 2001) (citations omitted). The complaint must "do more than simply parrot the legal elements of the cause[s] of action," but must plead *facts* that, if true, would support each required

element. ***Lee v. State Volunteer Mut. Ins. Co.***, No. E2002-03127-COA-R3-CV, 2005 WL 123492, at *10 (Tenn. Ct. App. E.S., filed January 21, 2005) (Koch, J.).

The complaint in the instant case utterly fails to meet this standard. Firstly, as to the tortious interference claims, no facts are asserted that would even arguably establish intent or malice, the third and fourth elements of the tort under ***Buddy Lee Attractions, Inc. v. William Morris Agency, Inc.***, 13 S.W.3d 343, 359 (Tenn. Ct. App. 1999).[1] Secondly, with regard to the claims against defendant Norris Johnson for breach of contract and breach of fiduciary duty, Defendants concede that the first element of each cause of action – the existence of a contract, and of a fiduciary duty, respectively – is successfully alleged, by way of the claim that Mr. Johnson agreed to be Plaintiff's C.E.O. Yet the terms of the contract are not disclosed, nor is the nature of the fiduciary duty discussed, and thus the assertions of misconduct by Mr. Johnson – which are factually sparse in any event – do not effectively allege a breach of either the contract or the duty. Consequently, the parallel claims against the two corporations also must fail, as they depend upon Mr. Johnson's supposed breaches being imputed to the companies. Finally, as to the claim of negligence, Plaintiff seemingly does not even attempt to allege facts that would support this claim. The complaint states literally nothing in support of this claim beyond a simple recitation of the word "negligence." The self-evident inadequacy of such a meager pleading requires no further comment. Dismissal was appropriate.

Denial of the post-dismissal motions was also appropriate. Plaintiff had adequate time to file a motion to amend its complaint *before* the trial court's order of dismissal, but failed to do so.[2] Plaintiff cannot now be heard to complain about the court's refusal to grant a belated amendment. In any event, Plaintiff offered no valid legal grounds to set aside the judgment in its Tenn. R. Civ. P. 59.04 motion to alter or amend the judgment, and the failure of that motion necessarily doomed Plaintiff's contemporaneous motion to amend its complaint. In a recent case concerning this precise issue, we opined as follows:

> Tennessee law and policy have always favored permitting litigants to amend their pleadings to enable disputes to be resolved on their merits rather than on legal technicalities. . . . However, once a judgment dismissing a case has been entered, the plaintiff cannot seek to amend its complaint without first convincing the trial court to set aside its dismissal pursuant to Tenn. R. Civ. P. 59 or 60.
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> * * *

[1] We are also extremely doubtful that the complaint's vague and somewhat conclusory assertions of the fifth, sixth and seventh elements – breach of contract, proximate causation, and damages – are legally sufficient.

[2] In the proceedings below, Plaintiff complained that because Defendants' motion to dismiss was filed on Wednesday, November 22, 2006 – the day before Thanksgiving – Plaintiff did not become aware of the motion until Monday, November 27, 2006. That still leaves eleven full days prior to the December 8, 2006, hearing at which the case was dismissed, during which time Plaintiff could have filed a motion to amend its complaint, but did not.

> [W]e decline to interpret Tenn. R. Civ. P. 15.01 to require trial courts to invite plaintiffs to amend their complaint before granting a Tenn. R. Civ. P. 12.02(6) motion. Such a rule would cause great trouble, delay, and expense for defendants and the courts, give plaintiffs an unfair procedural advantage, and remove any incentive for plaintiffs to be proactive in amending defective complaints in the face of meritorious Tenn. R. Civ. P. 12.02(6) motions to dismiss.

Lee, 2005 WL 123492, at *11. ***Lee***'s holding controls this case. The trial court committed no error in denying Plaintiff's post-dismissal motions.

Defendant argues that Plaintiff's appeal is frivolous under Tenn. Code Ann. § 27-1-122 (Supp. 2007). *See* ***Davis v. Gulf Ins. Group***, 546 S.W.2d 583, 586 (Tenn. 1977) (an appeal with "no reasonable chance of success" is frivolous); ***Wells v. Sentry Ins. Co.***, 834 S.W.2d 935, 938 (Tenn. 1992) (an appeal wherein the appellant has "cited no evidence or rule of law which would entitle [it] to a reversal or other relief from the decree of the trial court" is frivolous). It is true that Plaintiff's argument section is barely more than two pages long, and that its discussion of the Rule 12 issue consists almost entirely of recitation of general legal principles without any apparent attempt to state how they apply to the facts of this case. Plaintiff's core "analysis" of that issue, in its entirety, states as follows:

> The Appellant would submit that sufficient facts were plead [sic] in their [sic] complaint to meet the elements of tortious interference with contractual relations, breach of contract, negligence and breach of fiduciary duty and the Judge's ruling in granting the motion was error and an abuse of discretion.

Plaintiff does not elaborate on *what* "facts were plead" that supposedly "meet the elements" of these causes of action. We agree with Defendants that "this Court is entitled to expect significantly more from an appellant's brief than the abbreviated, summary, conclusory analysis presented here." However, we decline to declare the appeal frivolous because, with regard to the issue of whether the trial court should have allowed Plaintiff to amend its complaint, Plaintiff does cite a case, ***Richland Country Club, Inc. v. CRC Equities, Inc.***, 832 S.W.2d 554, 558-59 (Tenn. Ct. App. 1991), that plausibly supports its position. We believe ***Richland***'s treatment of the post-dismissal amendment issue is no longer the prevailing law in Tennessee, and that ***Lee***, 2005 WL 123492, at *11, is now controlling. However, Plaintiff's attempted reliance on ***Richland*** is sufficiently reasonable to spare it from Tenn. Code Ann. § 27-1-122 penalties.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Morris Properties, Inc. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE